IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH.

CWP No.6999 of 2007
Date of decision: 12.7.2007

Binish Kathuria & Others.

-----Petitioners

Vs.

State of Punjab and others.

-----Respondents

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR JUSTICE AJAI LAMBA

Present: Mr. Ashok Sharma Nabhewala, Advocate
for the petitioners.

Adarsh Kumar Goel, J.

This petition challenges Clauses 13 and 14 of the Notification No.5/8/2007-3HB3/1334 dated 21.03.2007 laying down procedure and conditions for admission to Post Graduate Degree/Diploma Courses during the session 2007.

Case of the petitioners is that they are graduates from medical colleges in the State of Punjab and have appeared in Post Graduate Entrance Test for admission to M.D./M.S./P.G. Diploma/MDS and DM/MCH Courses.

As per notification (Annexure P-1), except the seats to be filled by the Central Government, all other seats are reserved for bonafide residents of the State of Punjab. It has been further provided

that out of 50% of seats to be filled up out the residents of Punjab, 60% seats are from in-service candidates and 40% from others.

Clauses 13 and 14, which have been called in question, are as under:-

> "13. All seats in the Post Graduate courses, except the seats to be filled by the Central Government, in all the Institutions both Government & Private aided, unaided or minority, shall be filled out of the eligible candidates, who are bonafide residents of the State of Punjab. Punjab Resident status of candidates will be determined in terms of the instructions issued by the Government of Punjab in the Department of Personnel (Personnel Policies Branch) vide its circular letters No.1/3/95-3PPII/9619, dated 6/6/1996 and No.1/2/95-3PII/81 dated 1/1/1999. Condition of bonafide residents of the State of Punjab shall not be applicable to the candidates belonging to the following categories of Punjab residents:-
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> i. Children/wards/dependents (whose parents are not alive) of all those Punjab Government employees, members of All India Services borne on Punjab cadre, of Judges and employees of the Punjab and Haryana High Court, employees Boards/Corporations/Statutory Bodies established by an act of the State of Punjab who have remained posted outside Punjab for at least three years out of the five years preceding the year of PGET-2007 and their wards because of their posting outside Punjab had to do MBBS/BDS from an institution outside Punjab.
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> ii. Children/wards/dependents (whose parents are not alive) of all those Central employees, employees of Boards/Corporations/Statutory Bodies established by an Act of the Central Government who have remained

posted inside Punjab for at least three years out of the five years preceding the year of PGET-2007 and their wards because of their posting outside Punjab had to do MBBS/BDS from an institution outside Punjab.

iii. Children/wards/dependents (whose parents are not alive) of all those Punjab Government pensioners who have remained posted outside Punjab for three years out of the five years preceding the year of PGET-2007 and have settled outside Punjab and their wards because of their posting outside Punjab had to do MBBS/BDS from an institution outside Punjab.

iv. Children/wards/dependents (whose parents are not alive) of military/para military forces personnel who were born in the territory of Punjab as per their service record at the time of entry into the service.

v. Children/wards/dependents (whose parents are not alive) of Ex-employees of military/para military forces who were born in the territory of Punjab as per their service record at the time of entry into the service and have retired within five years preceding the year of PGET-2007 and have settled outside Punjab.

14. In the Government institutions, 50% of the total seats in every such institution shall be filled by the Government of India on all India basis through an all India Competitive Entrance Test. The remaining seats shall be filled through the Post Graduate Entrance Test-2007 (PGET-2007). Out of the remaining seats, 60% seats shall be filled up from amongst the eligible PCMS/PCMS (Dental)/PDES in service doctors and 40% shall be open to all eligible medical/dental graduates."

Learned counsel for the petitioners submitted that filling up of 50% of seats from the bona fide residents of Punjab was against the judgment of Hon'ble Supreme Court in ***Saurabh Chaudri and another v. Union of India*** AIR 2004 SC 361. It was submitted that what was upheld in **Saurabh Chaudhri** (*supra),* was reservation by way of institutional preference, while as per Clause 13, reservation has been made for residents of the State. He further submitted that reservation based on residential requirement, was not permissible for Post Graduate courses.

Though this aspect may have required consideration, in view of observations of the Hon'ble Supreme Court in **Saurabh Chaudhri** (*supra)* (para 48), we find that the issue has already been gone into in a judgment of this Court dated 24.05.2007 in C.W.P. No.5446 of 2007, ***Dr. Manish Sethi and others v. State of Punjab and others***. In the said judgment, clause 37 of the impugned order was quashed and a direction was issued to make reservation in terms of judgment of the Hon'ble Supreme Court in **Saurabh Chaudhri** (*supra).* Operative part of the said judgment is as under:-

> "In view of facts mentioned above, clause 37 of the notification No.5/8/2007-3 HB3/1334, dated March 21, 2007 (Annexure P-1), as mentioned in the prospectus for PGET-2007 is quashed being contrary to the law laid down by the Hon'ble Supreme Court in ***Magan Mehrotra's case*** (supra) and also reiterated in ***Saurabh Chaudhary's case*** (supra) and being ultra vires to the mandate of Article 14 of the Constitution of India. However, keeping in view ratio of the judgments, referred to above, liberty is granted to

respondents No.1 and 2 to reserve, by way of institutional preference, to the exclusion of the petitioners, 11 seats out of 21 seats available for general category candidates."

This aspect of the matter has also been noted in another judgment of this Court dated 11.07.2007 in ***Dr. Priya Garg v. State of Punjab and Others*** (C.W.P. No.9957 of 2007), while dealing with the issue of order of counselling.

In view of above, challenge to Clause 13 of the impugned notification has been rendered unnecessary. Needless to observe that the State of Punjab is bound by the law laid by the Hon'ble Supreme Court in **Saurabh Chaudhri** (*supra),* that reservation for Post Graduate courses has to be based on institutional preference and not on place of residence, apart from other permissible constitutional reservations. Observations of the Hon'ble Supreme Court in **Saurabh Chaudhri** (*supra),* relied upon by learned counsel for the petitioners in para 48 of the judgment, are as under:-

> 48. Referring to the State mentality and pointing out to the law that there does not exist any separate State domicile in India, this Court specifically banished the residential requirement for the purpose of admission into Post-Graduate Medical Courses for all times. It directed :
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> "So much for admission to the MBBS course, but different consideration must prevail when we come to consider the question of reservation based on residence requirement within the State or on institutional preference for admission to the post-graduate courses, such as, MD, MS and the like. There we cannot allow excellence to be

compromised by any other considerations because that would be detrimental to the interest of the nation. It was rightly pointed out by Krishna Iyer, J. in Jagdish Saran case, and we wholly endorse what he has said :-

> The basic medical needs of a region or the preferential push justified for a handicapped group cannot prevail in the same measure at the highest scales of speciality where the best skill or talent, must be handpicked by selecting according to capability. At the level of PhD, MD, or levels of higher proficiency, where intentional measure of talent is made, where losing one great scientist or technologist in the making is a natinal loss, the considerations we have expanded upon as important lose their potency. Here equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk. (SCC pp. 778-79, para 23).
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> If equality of opportunity for every person in the country is the constitutional guarantee, a candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels of education like post-graduate courses. After all, top technological expertise in any vital field like medicine is a nation's human asset without which its advance and development will be stunted. The role of high grade skill or special talent may be less at the lesser levels of education, jobs and disciplines of social inconsequence, but more at the higher levels of sophisticated skills and strategic employment. To devalue merit at the summit is to temporise with the country's development in the vital areas of professional expertise. In science and technology and other specialised fields of developmental significance, to relax

lazily or easily in regard to exacting standards of performance may be running a grave national risk because in advanced medicine and other critical departments of higher knowledge, crucial to material progress, the people of India should not be denied the best the nation's talent lying latent can produce. If the best potential in these fields is cold shouldered for populist considerations garbed as reservations, the victims, in the long run, may be the pople themselves. Of course, this unrelenting strictness in selecting the best may not be so imperative at other levels where a broad measure of efficiency may be good enough and what is needed is merely to weed out the worthless. (SCC p. 785, para 39)

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Secondly, and more importantly, it is difficult to denounce or renounce the merit criterion when the selection is for post-graduate or post-doctoral courses in specialised subjects. There is no substance for sheer flair, for creative talent, for fine-tuned performance at the difficult heights of some disciplines where the best alone is likely to blossom as the best. To sympathise mawkishly with the weaker sections by selecting sub-standard candidates, is to punish society as a whole by denying the prospect of excellence say in hospital service. Even the poorest, when stricken by critical illness, needs the attention of super-skilled specialists, not humdrum second rates. So it is that relaxation on merit, by overruling equality and quality altogether, is a social risk where the stage is post-graduate or post-doctoral. (SCC p. 786, para 44)

These passages from the judgment of Krishna Iyer, J. clearly and forcibly express the same view which we have independently reached on our own and indeed that view has been so ably expressed in these passages that we do not think we can usefully add anything to what has already

been said there. We may point out that the Indian Medical Council has also emphasised that playing with merit, so far as admissions to post-graduate courses are concerned, for pampering local feeling, will boomerang. We may with advantage reproduce the recommendation of the Indian Medical Council on this point which may not be the last word in social wisdom but is certainly worthy of consideration :

Students for post-graduate training should be selected strictly on merit judged on the basis of academic record in the under-graduate course. All selection for post-graduate studies should be conduced by the Universities.

The Medical Education Review Committee has also expressed the opinion that "all admissions to the post-graduate courses in any institution should be open to candidates on an all-India basis and there should be no restriction regarding domicile in the State/Union Territory in which the institution is located." So also in the policy statement filed by the learned Attorney-General, the Government of India has categorically expressed the view that :

So far as admission to the institutions of post-graduate colleges and special professional colleges is concerned, it should be entirely on the basis of all-India merit subject to constitutional reservations in favour of Scheduled Castes and Scheduled Tribes.

We are therefore of the view that so far as admissions to post-graduate courses, such as MS, MD and the like are concerned, it would be eminently desirable not to provide for any reservation based on residence requirement within the State or on institutional preference. But, having regard to broader considerations of equality of opportunity and institutional continuity in education which has its own importance and value, we would direct that though

residence requirement within the State shall not be a ground for reservation in admissions to post-graduate courses, a certain percentage of seats may in the present circumstances, be reserved on the basis of institutional preference in the sense that a student who has passed MBBS course from a medical college or University, may be given preference for admission to the post-graduate course in the same medical college or University but such reservation on the basis of institutional preference should not in any event exceed 50 per cent. of the total number of open seats available for admission to the post-graduate course. This outer limit which we are fixing will also be subject to revision on the lower side by the Indian Medical Council in the same manner as directed by us in the case of admission to the MBBS course. But, even in regard to admissions to the post-graduate course, we would direct that so far as super specialities such as neuro-surgery and cardiology are concerned, there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on merit on all-India basis."

It in no uncertain terms directed :

"The decisions reached by us in these writ petitions will bind the Union of India, the State Governments and Administrations of Union Territories because it lays down the law for the entire country and moreover we have reached this decision after giving notice to the Union of India and all the State Governments and Union Territories. . . . . ."

Coming now to the question of validity of Clause 14, reproduced above, reservation for in-service candidates has been upheld on the ground that the said reservation was merely a source of

admission, validity of which could not be determined on the constitutional principles applicable to communal reservation. Reference may be made to judgment of the Hon'ble Supreme Court in ***K. Duraisamy and another v. State of Tamilnadu and others*** (2001) 2 SCC 538. The matter was again considered by the Hon'ble Supreme Court in ***State of Madhya Pradesh and others v. Gopal D. Tirthani and others*** AIR 2003 SC 2952 and it was observed:-

> "19. The controversy in the present litigation does not concern the open category candidates; it is confined to in-service candidates. We, therefore, propose to preface our discussion by determining the nature of 20% seats allocated to in-service candidates - whether it is by way of reservation or quota or is a channel of entry. Our task stands simplified by the law laid down by a three-Judge Bench decision of this Court recently in K. Duraiswamy and another v. State of Tamil Nadu and others (2001) 2 SCC 538. The question arose for decision in almost a similar factual background. The seats were at the State level and not all-India quota seats. The State Government had allocated 50% of the seats exclusively for in-service candidates and left the remaining 50% seats as open quota, i.e., to be filled in from out of such candidates as were not in State Government service. The classification was made as 'service quota' and 'open quota,' for in-service candidates and other candidates respectively, confining the respective class/cadre candidates to the respective percentages earmarked for the two of them exclusively. The Court held :-
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> (i) the Government possesses the right and authority to decide from what sources the admissions in educational

institutions or to particular disciplines and courses therein have to be made and that too in what proportion;

(ii) that such allocation of seats in the form of fixation of quota is not to be equated with the usual form of communal reservation and, therefore, the constitutional and legal considerations relevant to communal reservations are out of place while deciding the case based on such allocation of seats;

(iii) that such exclusive allocation and stipulation of a definite quota or number of seats between in-service and non-service or private candidates provided two separate channels of entry and a candidate belonging to one exclusive quota cannot claim to steal a march into another exclusive quota by advancing a claim based on merit. Inter se merit of the candidates in each quota shall be determined based on the merit performance of the candidates belonging to that quota;

(iv) that the mere use of the word 'reservation' per se is not decisive of the nature of allocation. Whether it is a reservation or an allocation of seats for the purpose of providing two separate and exclusive sources of entry would depend on the purpose and object with which the expression has been used and that would be determinative of the meaning, content and purport of the expression. Where the scheme envisages not a mere reservation but is one of the classification of the sources from which admissions are to be accorded, fixation of respective quota for such classified groups does not attract applicability of considerations relevant to reservation simplicitor.

20. K. Doraiswamy's case (supra) was considered and explained by another three-Judge Bench of this Court in AIIMS Students' Union v. AIIMS and others (2002) 1 SCC

428. The following observation is appropriate and apposite for the purpose of the case at hand and is, therefore, extracted and reproduced hereunder. The Court was considering the question of allocation of seats between in-service and open category candidates, the candidates in both the categories being medical graduates, and not a reservation in favour of weaker section of the society or those who deserve or need to be affirmatively discriminated. The Court then said-

"Some of them had done graduation sometime in the past and were either picked up in the Government service or had sought for joining Government service because, may be, they could not get a seat in post-graduation and thereby continue their studies because of shortage of seats in higher level of studies. On account of their having remained occupied with their service obligations, they became detached or distanced from theoretical studies and, therefore, could not have done so well as to effectively compete with fresh medical graduates at the PG entrance examination. Permitting in-service candidates to do post-graduation by opening a separate channel for admittance would enable their continuance in Government service after post-graduation which would enrich health services of the nation. Candidates in open category having qualified in post-graduation may not necessarily feel attracted to public services. Providing two sources of entry at the post-graduation level in a certain proportion between in-service candidates and other candidates thus achieves the laudable object of making available better doctors both in public sector and as private practitioners. The object sought to be achieved is to benefit two segments of the same society by enriching both at the end and not so much as to provide protection and encouragement to one at the entry level."

The conclusion reached in the judgment, has been summed up in para 36 of the said judgment as under:-

> "36. We sum up our conclusions as under :-
> 1. In the State of Madhya Pradesh allocation of 20% seats in post-graduation in the Universities of Madhya Pradesh for in-service candidates is not a reservation; it is a separate and exclusive channel of entry or source of admission, the validity whereof cannot be determined on the constitutional principles applicable to communal reservations. Such two channels of entry or two sources of admission is a valid provision.
> 2. There can be only one common entrance test for determining eligibility for post-graduation for in-service candidates and those not in service. The requirement of minimum qualifying marks cannot be lowered or relaxed contrary to Medical Council of India Regulations framed in this behalf.
> 3. In the State of Madhya Pradesh there are five Universities, i.e. there are Universities more than one. Regulation 9(2)(iii) cannot be made use of in the State of Madhya Pradesh either singly or in combination with Cl. (i) for determining the eligibility for entrance into PG courses.
> 4. It is permissible to assign a reasonable weightage for service rendered in rural/tribal areas by in-service candidates for the purpose of determining inter se merit within the class of in-service candidates who have qualified in the Pre-PG test by securing the minimum qualifying marks as prescribed by the Medical Council of India.
> 5. Women candidates constitute a class by themselves and the provision of relaxed or reduced eligibility criteria by reference to continuous service rendered in rural areas for the purpose of sponsorship by the State Government in

specified disciplines which have utility for serving women folk in villages does not suffer from the vice of invidious discrimination."

The issue of in-service candidates has also been considered by this Court in ***Dr. Balwinder Singh & Others*** ***v. State of Punjab and others*** (C.W.P. No.6458 of 2007) decided on 9.7.2007.

Thus, Clause 14 of the impugned order not having been shown to be inconsistent with the observations of the Hon'ble Supreme Court in ***Gopal D. Tirthani*** (*supra),* the same cannot be declared to be invalid.

The writ petition is disposed of accordingly. `

(ADARSH KUMAR GOEL)
JUDGE

July 12, 2007
ashwani

(AJAI LAMBA)
JUDGE